No. 87-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BRENDA PATTERSON,

Petitioner,

—v.—

McLEAN CREDIT UNION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION ON BEHALF OF PETITIONER PATTERSON

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INTEREST OF AMICI CURIAE

The Association of the Bar of the City of New York ("the Association"), chartered by the State of New York in 1871, is an organization of over 18,000 attorneys, most of whom are practicing or resident principally in the New York City metropolitan area. The Constitution of the Association provides as two of its purposes "promoting reforms in the law" and "facilitating and improving the administration of justice." The Association has accordingly devoted itself

vigorously for many years to supporting remedial civil rights legislation in Congress and before this Court.

The New York County Lawyers' Association ("NYCLA"), one of the largest county bar associations in the United States, is a New York not-for-profit corporation whose membership is composed of more than 10,000 attorneys practicing in all fields of law. Since its founding, NYCLA has been an active force in the promulgation of laws ensuring civil rights, political equality and equal justice. NYCLA has engaged in numerous activities aimed at eliminating discrimination against minorities, including preparing reports, drafting and testifying in support of legislation, and appearing as *amicus curiae* in litigation in both federal and state court.

The Court's direction to the parties to brief whether *Runyon v. McCrary*, 427 U.S. 160 (1976) should be reconsidered threatens one of the principal missions of bar associations such as *amici*: the promotion of respect for law. In New York, achieving and maintaining the confidence of racial minorities in legal institutions is an ongoing and critically difficult task. Overruling *Runyon* would cause tremendous damage to the Bar's ability to accomplish that task.

Amici believe that the remedy 42 U.S.C. § 1981 provides to redress racially-based refusals to contract is essential to make the national commitment to eradicating discrimination more than a paper promise. To ensure that that promise is not broken by an unjustified retreat from advances made and repeatedly ratified by the people's representatives in Congress, we submit this brief *amici curiae*, with the consent of both parties indicated by letters lodged with the Clerk, urging the Court to adhere to *Runyon v. McCrary*.

INTRODUCTION AND SUMMARY OF ARGUMENT

For at least three powerfully persuasive reasons — because the Court's work would otherwise be multiplied beyond reason, because the arrangements of private and governmental actors in this free society (particularly in the field of civil rights) depend in great measure on the security and stability of settled law, and because reconsideration of settled questions involving fundamental rights would imperil the public's perception of the judicial system as a dependable mechanism for redressing racial discrimination — the doctrine of *stare decisis* has commanded the unquestioning and uncontroversial allegiance of every justice of this Court. The Court may be divided in a given case about whether the doctrine requires adherence to prior decisions, but there is no dispute about the general outlines of the doctrine, and in particular no serious dispute about two propositions, both of which foreclose overruling *Runyon v. McCrary*'s holding that Section 1981 reaches private acts of discrimination.

First, while a decision construing a statute should not be overruled unless a majority is persuaded that the prior construction was clearly wrong,[6] here much historical evidence plainly supports the interpretation

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[6] *Patsy v. Board of Regents*, 457 U.S. 496, 501 (1982) (refusing to overrule earlier decision, in part because previous interpretation of legislative intent was not clearly wrong); *id.* at 517 ("in a statutory case a particularly strong showing is required that we have reread the relevant statute and its history.") (White, J., concurring); *Monell v. Dep't of Social Services*, 436 U.S. 658, 664-65 (1978) (finding that earlier decision misread history "beyond doubt"); *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322 (1972) (prior interpretation overruled because holding "was never good history"); *Peyton v. Rowe*, 391 U.S. 54, 67 (1967) (prior statutory interpretation overruled because it rested on common law notion which "finds no support in the statute and has been rejected").

of *Runyon* and its predecessors. It cannot be said of Justice Stewart's opinion for the Court in *Runyon* that it clearly and unmistakably misread the legislative language and history.

Second, a decision should not be overruled unless its reasoning has been repudiated by or is inconsistent with later decisions or has been undercut by subsequent congressional activity. This Court has uniformly adhered to its precedents when, as here, Congress has affirmatively relied on and built upon a ruling and has thereby presented the Court with a solid basis for concluding that its decision is consistent with the legislative will.

These considerations foreclose overruling *Runyon*. Far from having been undercut or repudiated by subsequent decisions, *Runyon* has served as the foundation for a series of further, uncontroversial decisions in this Court, and additional legislation by Congress predicated on *Runyon's* interpretation of Section 1981.

Adherence to *Runyon* is also supported by the three policies principally underlying *stare decisis*: the necessity for clear guidelines and protecting reliance interests, eliminating the burdens that relitigation imposes, and the need to maintain public faith in the courts as a source of impersonal and reasoned judgment.

We will not revisit here the evidence surrounding the 19th century history of Section 1981. In light of *Runyon's* consistency with prior decisions of this Court and of every court of appeals considering the issue, and particularly in light of consistent congressional approval of and reliance on judicial decisions construing Section 1981 as reaching private discrimination, *Runyon's* holding that Section 1981 proscribes refusals to enter contracts on account of race must be reaffirmed.

I

RUNYON v. McCRARY IS AN INTEGRAL PART OF FEDERAL LAW, AND HAS BEEN EXPRESSLY APPROVED AND BUILT UPON BY CONGRESS

The holding in *Runyon v. McCrary* that Section 1981 proscribes not only statutes depriving black persons of the right to contract with white persons but also racially discriminatory refusals by white persons to enter into contracts with black persons is not — as statutory decisions subject to reconsideration and overruling must be — "a sport in the law and inconsistent with what preceded and what followed." *Monroe v. Pape*, 365 U.S. 167, 185 (1961). It is not "the product of hasty action or inadvertence ... out of line with the cases that preceded." *Id.* To the contrary, it is solidly based on prior, considered holdings, reached after full and mature consideration of the historical record; is consistent with the contemporaneous policy judgments of the political branches; and has been relied on and built upon by Congress. A survey of the interdependence and consistency of the *Runyon* holding with other aspects of modern American civil rights law is the indispensable backdrop for assessing whether principles of *stare decisis* warrant even its reconsideration, much less its overruling.

A. Runyon follows prior settled law

Runyon's interpretation of Section 1981 made no new law. As then-Solicitor General Robert Bork's brief for the United States in support of the parents in *Runyon* succinctly advised this Court,

> it is now settled that Section 1981 prohibits all racial discrimination, private as well as public, interfering with the making and enforcement of contracts. This Court so held in *Tillman v. Wheaton-Haven Recreation Assn.*, *supra*, and

again more recently in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454.

Brief for the United States as *Amicus Curiae* in *Runyon* at 13. Solicitor General Bork's brief also noted that all eight courts of appeals that had been presented with the question prior to *Johnson v. Railway Express Agency* had concluded that "Section 1981 prohibits racial discrimination in private employment." *Id.* at 14.

Nor can *Runyon* and the holdings on which it was based be disregarded as carelessly or hastily considered. The Court's opinion in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), on which *Runyon*'s interpretation of Section 1981 is based, contains a thorough examination of the historical record, and the parties' briefs in *Runyon* exhaustively re-marshalled most of that history. *Runyon* itself was issued against a lengthy but ultimately unpersuasive dissent which included a detailed analysis of the historical evidence. Justice Powell, concurring, expressly noted that ample precedents supported *Runyon*, and that the Court had examined the history of Section 1981 "maturely and recently." 427 U.S. at 186.

B. This Court has repeatedly adhered to Runyon's interpretation of Section 1981

No doubt because *Runyon* followed settled precedent holding that Section 1981 proscribes racial discrimination in private contracts, it has been repeatedly adhered to by this Court. *See Bob Jones University v. United States*, 461 U.S. 574, 594 (1983) (*Runyon* cited to support view that a national policy disapproving racial discrimination in nonpublic education exists); *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987) (union intentionally avoiding assertion of employee discrimination claims violates Section 1981); *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022 (1987) (holding

in private employment discrimination case that Congress intended to protect identifiable classes of persons subjected to intentional discrimination on the basis of ancestry); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982) (finding that action under Section 1981 requires proof of intent to discriminate); *Memphis v. Greene*, 451 U.S. 100, 120 (1981) (*Runyon* cited to support proposition that 1866 Civil Rights Act is applicable to private parties); and *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285 (1976) (holding that Section 1981 prohibits racial discrimination in private employment against whites as well as blacks).[8]

[8] Both before and after *Runyon v. McCrary*, lower courts have applied Section 1981 to remedy racial discrimination in a variety of contexts, including many that might not be remediable under other statutes. *See, e.g., Wyatt v. Security Inn Food & Beverage, Inc.*, 819 F.2d 69 (4th Cir. 1987) (hotel lounge policy of ejecting patrons for not drinking); *Jones v. Local 520, Int'l Union of Operating Engineers*, 603 F.2d 664 (7th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980) (deprivation of union's beneficiary rights policy); *Scott v. Young*, 421 F.2d 143 (4th Cir. 1970), *cert. denied*, 398 U.S. 929 (1970) (admission ticket to an amusement park); *Oizman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (2d Cir. 1974) (guest privileges in a swimming club); *Vietnamese Fisherman's Ass'n v. Knights of Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex 1981) (interfering with right to earn a living); *Howard Sec. Ser., Inc. v. Johns Hopkins Hospital*, 516 F. Supp. 508 (D. Md. 1981) (failure to award service contract to close corporation owned by black); *Sud v. Import Motors Limited, Inc.*, 379 F. Supp. 1064 (W.D. Mich. 1974) (automobile franchise denied by automobile wholesaler); *Hernandez v. Erlenbusch*, 368 F. Supp. 752 (D. Ore. 1973) (admission to a tavern); *Grier v. Specialized Skills, Inc.*, 326 F. Supp. 856 (W.D.N.C. 1971) (admission to a privately owned barber trade school); *Amerson v. Jones Law School*, Civil Action 3343-N (M.D. Ala., Aug. 10, 1972) (admission to a privately owned school); *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112 (D. Mass. 1972) (purchase of an insurance policy); *United States v. Medical Soc'y of S. Carolina*, 298 F. Supp. 145, 152 (D.S.C. 1969) (admission of patients to a privately owned hospital).

A decision overruling *Runyon* would also necessarily overrule *Goodman*, *Saint Francis College*, and *McDonald*, and might call *Jones* and its progeny into question.

C. Congress approved of and built upon Runyon's interpretation of Section 1981 even prior to the decision in that case

When it reaffirmed Section 1981's applicability to discriminatory refusals by segregated private schools to contract with black parents for the admission of their children in *Runyon*, the Court examined not only the original legislative history of Section 1981 but also the congressional response to this Court's interpretation of Section 1981 in *Johnson* and *Tillman*. Congressional debate and action in connection with the Equal Employment Opportunity Act of 1972 clearly evidenced Congress' understanding that Section 1981 reached private discrimination, and its intention that it continue to do so.

In response to an amendment by Senator Hruska that would have rendered Title VII of the Civil Rights Act of 1964 an exclusive remedy for employment discrimination, Senator Williams stated on the floor that Section 1981 already reached private employment discrimination, and implored his colleagues not to "repeal existing civil rights laws" and thereby "severely weaken our overall effort to combat the presence of employment discrimination." *See Runyon*, 427 U.S. at 174 n.11; Brief for the United States *amicus curiae* in *Runyon* at 18 and authorities there cited. Congress rejected the Hruska amendment, clearly indicating its intention that there be a system of overlapping parallel remedies. The defeat of the Hruska amendment is therefore far more than the congressional inaction that, in far different circumstances, the Court has viewed as

unpersuasive.[3] As Solicitor General Bork urged the Court:

> Had Congress disapproved of this Court's interpretation of the scope of Sections 1981 and 1982, it could have amended the Civil Rights Act of 1866; all attempts to do so, however, have been defeated. *Cf., e.g., Flood v. Kuhn*, 407 U.S. 258; *Joint Industry Board v. United States*, 391 U.S. 224, 228-29 (footnote omitted).

D. Congress subsequently approved of and built upon Runyon

Congress again indicated its agreement that Section 1981 applies to private discrimination in 1976, when it enacted the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended (hereinafter the "Fees Act"). The Fees Act expressly authorized courts to award attorneys' fees in actions to enforce Section 1981. The legislative reports, on which this Court has repeatedly relied,[4] plainly evidence Congress' understanding that Section 1981 applies to private discrimination, its approval of that construction, and its intention to build upon it in augmenting existing remedies already provided by Section 1981:

> Section 1981 is frequently used to challenge employment discrimination based on race or color. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).[5] Under that section the Supreme Court recently held that whites

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[3] *See Bob Jones University v. United States*, 461 U.S. 574, 600-601 (1983), and cases there cited.

[4] *See, e.g., Riverside v. Rivera*, 477 U.S. 561, 567 (1986); *Pulliam v. Allen*, 466 U.S. 522, 527 (1984); *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 758 n.5 (1980); *Hutto v. Finney*, 437 U.S. 678, 694 (1978).

as well as blacks could bring suit alleging racially discriminatory employment practices. *McDonald v. Santa Fe Trail Transportation Co.*, _____ U.S. _____, 96 S. Ct. 2574 (1976). Section 1981 has also been cited to attack exclusionary admissions policies at recreational facilities. *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U.S. 431 (1973). Section 1982 is regularly used to attack discrimination in property transactions, such as the purchase of a home. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).[9]

[8] With respect to the relationship between Section 1981 and the Title VII of the Civil Rights Act of 1964, the House Committee on Education and Labor has noted that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H.R. Rept. No. 92-238, p. 19 (92nd Cong. 1st Sess. 1971). That view was adopted by the Supreme Court in *Johnson v. Railway Express Agency*, *supra*.

[9] As with Section 1981 and Title VII, Section 1982 and Title VIII of the Civil Rights Act of 1968 are complementary remedies, with similarities and differences in coverage and enforcement mechanism. *See Jones v. Mayer Co.*, *supra*.

H.R. Rep. 94-1558, 94th Cong., 2nd Sess., at 3. *See also* S. Rep. 94-1011, 94th Cong., 2nd Sess. 3 (1976), *reprinted in* 1976 U.S. Code Cong. and Adm. News 5908, 5910 (noting that Section 1981 "protects similar

rights" as Title VII "but involves fewer technical prerequisites.")

Congress reaffirmed its approval of *Runyon* yet again in 1982, when it held hearings to investigate the Reagan administration's refusal to defend IRS rules rendering donations to racially discriminatory educational institutions of education non-deductible under Section 170 of the Internal Revenue Code. *See Bob Jones University v. United States*, 461 U.S. at 574. *Runyon* was repeatedly and approvingly cited in those hearings as the keystone in the legal structure supporting the IRS determination to deny charitable deductions for contributions to racially discriminatory schools as violative of public policy.[5] As the Court said

[5] Witnesses at both Senate and House hearings repeatedly cited *Runyon* for the proposition that private schools may not discriminate based on race, and there was no indication any committee members believed that *Runyon* was wrongly decided. *See, e.g., Administration's Change in Federal Policy Regarding the Tax Status of Racially Discriminatory Private Schools: Hearings Before the House Committee on Ways and Means*, 97th Cong., 2d Sess. 187 (1982) (statement of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division) ("the Supreme Court said ... in *Runyon v. McCrary* that 42 U.S.C. § 1981 specifically forbade private schools from discriminating on the grounds of race or color."); *id.* at 67 (statement of Laurence Tribe, Professor of Constitutional Law, Harvard Law School)("one of the illegal activities under the Civil Rights Act of 1866 is excluding people on grounds of race, even from a private school [according to] ... *Runyon v. McCrary*.") *See also id.* at 37 (statement of Michael I. Sanders); *id.* at 267 (Joint Statement Re the Tax Exempt Status of Private Schools submitted to the Committee on Ways and Means); *Legislation to Deny Tax Exemption to Racially Discriminatory Private Schools: Hearings Before the Senate Committee on Finance*, 97th Cong., 2d Sess. 25 (1982) [hereinafter *"Senate Hearings"*] (background material prepared by the staff of the Joint Committee on Taxation).

(Footnote continued)

of the closely related question addressed in *Bob Jones University*, 461 U.S. at 600-01, "It is hardly conceivable that Congress — and in this setting, any Member of Congress — was not abundantly aware" that Section 1981 had been interpreted to apply to private acts of discrimination.

E. The principle that racial discrimination in the private sector is unlawful and should be actionable is not unique to Runyon, but has been widely adopted and implemented by the executive and legislative branches and by state and local governments

The primary duty not to discriminate against racial minorities in economic activity did not spring full grown from *Runyon v. McCrary*. The proscription against private discrimination reaffirmed in *Runyon*, far from being inconsistent with the weighing of values undertaken by Congress or the executive branch in other contexts, is fully consistent with a wide range of analogous proscriptions in legislation, executive orders, and administrative regulations.

As Justice Stevens observed concurring in *Runyon*, the principle that racial discrimination has no place in economic activity generally "surely accords with the prevailing sense of justice today." 427 U.S. at 191.

(Footnote continued)

Administration witnesses agreed that Section 1981 rendered it unlawful for private schools to discriminate on the basis of race. *See, e.g.*, in addition to the statement of W. Bradford Reynolds cited above, *Senate Hearings* 240 (statement of R.T. McNamar, Secretary, Department of the Treasury) ("The Court said, in *Runyon v. McCrary* several terms ago, that Section 1981 allows private citizens to bring a private right of action against those institutions that are racially discriminating."); *see also id.* at 117, 145 n.18 ("Analysis of Legal Authorities For Possible Inclusion in a Brief," submitted by the Department of Justice).

Many of the sanctions against discrimination in the private as well as public sector were exhaustively catalogued in Chief Justice Burger's opinion for eight members of the Court in *Bob Jones University v. United States*, 461 U.S. at 592-595, where the Court found that all three branches of government had joined in forging "the fundamental policy of eliminating racial discrimination." A sampling of other such sanctions, though surely not all, is set forth below.

Congress prohibited racial discrimination in private employment in 1964, and extended that prohibition in 1972.[6] This Court has upheld the right of private employers and unions to engage in affirmative, race-conscious action to remedy past discrimination.[7] Congress has attempted to remedy past discrimination in certain businesses, *e.g.*, construction, by providing for set asides for minority-owned firms, and this Court has upheld its right to do so.[8]

Discrimination in the private housing market was prohibited in 1968.[9]

Congress prohibited discrimination by recipients of federal aid — a category of institutions that includes within the private sector almost all secular institutions of higher education and hospitals — in Title VI of the Civil Rights Act of 1964, and succeeding administrations have generally enforced stringent regulations implementing that proscription.[10] When this Court narrowly construed that proscription, leaving a far

[6] Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e (1981).

[7] *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

[8] *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

[9] *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

[10] *See Grove City College v. Bell*, 465 U.S. 555, 586-592 (1984) (Brennan, J., concurring and dissenting).

broader range within which private discrimination could flourish, its decision was promptly condemned in Congress and throughout the nation at large, and was overturned by substantial majority in Congress.[11]

Discrimination in public accommodations was made unlawful by Title II of the Civil Rights Act of 1964.[12]

States and local governments have also independently condemned and provided varying remedies for discrimination in the private economic sector, and this Court has generally upheld this legislation against claims of federal preemption on the ground that Congress considered the anti-discrimination principle so important that its purposes would be furthered by a system of partially duplicative and overlapping remedies.[13]

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[11] The Civil Rights Restoration Act of 1987, Pub. L. 100-259, *overruling Grove City College v. Bell*, 465 U.S. 574 (1984), was passed by the Senate 75-14, 134 Cong. Rec. S205 (daily ed. January 28, 1988), and by the House 315-98, Cong. Rec. H555 (daily ed. March 2, 1988). After President Reagan subsequently vetoed the measure, his veto was overridden in the Senate by 73-24, 134 Cong. Rec. S2730 (daily ed. March 22, 1988), and in the House by 292-133, 134 Cong. Rec. H1037 (daily ed. March 22, 1988).

[12] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

[13] *See, e.g., California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683, 689-95 (1987) (California Pregnancy Discrimination Act not preempted by Title VII because Federal Pregnancy Discrimination Act does not conflict with the California law

(Footnote continued)

In sum, *Runyon* is wholly consistent with the legislative will of the nation. For this reason alone, it should not even be reconsidered, much less overruled.

II

PAST STATUTORY CONSTRUCTION MUST BE ADHERED TO WHERE OVERRULING WOULD CONTRAVENE RECENTLY EXPRESSED CONGRESSIONAL INTENT EMBODIED IN LEGISLATION, OR ABSENT A SHOWING THAT THE DECISION TO BE OVERRULED IS INCONSISTENT WITH SUBSEQUENT DECISIONS OR REPUDIATED BY SUBSEQUENT CONGRESSIONAL ACTION

Stare decisis is particularly weighty in matters of statutory construction. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 & n. 34 (1986) ("More than any other doctrine in the field of precedent, it has served to limit the freedom of the Court."); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Although the Court "has never announced a definitive formula for determining whether prior decisions should be overruled or reconsidered," *Patsy v. Board of Regents*, 457 U.S. 496 (1982), more than a mistake in past interpretation must be shown, since "correction can be had by legislation," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. at 406 (Brandeis, J.,

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(Footnote continued)

which "also promotes equal employment opportunity"), *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100-04 (1983) (Title VII held not to preempt New York statute proscribing discrimination on basis of pregnancy); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974) ("The legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination").

dissenting). This Court's application of the doctrine makes clear that fully considered interpretations of statutes must be adhered to unless a decision is found to be either contrary to congressional intent or in some other sense aberrational — *i.e.*, at odds with other clearly expressed legislative policies, or inconsistent with or repudiated by other decisions. Neither of these conditions permits overruling the interpretation of Section 1981 reaffirmed in *Runyon*.

A. Recent indications of congressional intent require adherence to Runyon's interpretation of Section 1981

This Court's reluctance to overrule its own precedents is nowhere stronger than in statutory cases where reliable indications of congressional intent demonstrate approval of the Court's interpretation of an earlier statute. *Maine v. Thiboutot*, 448 U.S. 1, 8 (1980); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Runyon v. McCrary*, 427 U.S. at 173-75; *Monell v. Dep't of Social Services*, 436 U.S. 658, 696-99 (1978); *Laird v. Nelms*, 406 U.S. 797, 802 (1972); *Monroe v. Pape*, 365 U.S. at 192 (Harlan, J., concurring).

When presented with affirmative legislation building upon a prior decision, as opposed to only congressional inaction or rejection of an attempt to alter the statutory meaning, this Court has uniformly adhered to its statutory interpretation, even if that interpretation is arguably incorrect. Such adherence has been required by the Court's fundamental duty to interpret statutes according to operative congressional intent as expressed through duly enacted legislation. The legislative intent underlying a subsequent statute that Congress has erected on the foundation of one of this Court's prior statutory interpretations can only be respected if that prior interpretation is adhered to, even

if it could be said to have misread the intentions of the Congress that enacted the earlier statute. Indeed, cases like this one, in which Congress has affirmatively built upon this Court's alleged "mistakes" of statutory interpretation, are not *stare decisis* cases at all: the Court adheres to its prior decisions not to maintain the continuity of its jurisprudence, but rather to obey more recent congressional direction.

Thus, in *Patsy v. Board of Regents*, 457 U.S. 496, 508-512 (1982), finding the legislative intentions of the nineteenth century Congress that enacted 42 U.S.C. § 1983 inconclusive, the Court relied principally on the legislative history of a far more recent statute, 42 U.S.C. § 1997e, in declining to overrule past decisions holding that exhaustion of administrative remedies was not required in Section 1983 cases. The Court observed that Congress had relied on and built upon the Court's prior, disputed interpretation of Section 1983 in designing the more recent statute. Since correction of any error "would be inconsistent with Congress' decision to adopt 1997e," overruling the decisions allegedly misinterpreting Section 1983 was deemed impermissible. Similarly, in *Miller v. Fenton*, 474 U.S. 104, 114 (1985), the Court adhered to its prior interpretation of the habeas corpus statute in *Townsend v. Sain*, 359 U.S. 64 (1959), where the voluntariness of a confession was treated as an issue of fact rather than of law, because Congress had relied on that earlier decision in designing 28 U.S.C. § 2254(d).[18]

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[18] *See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 (1982) ("Where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least

(Footnote continued)

This case presents such an abundance of clear subsequent legislative intent, discernible through legislation duly enacted as well as through unmistakable rejection of an attempt to render Section 1981 inapplicable to private discrimination, that departure from *stare decisis* would be not only inadvisable, in light of this Court's unbroken line of decisions, but impermissible, a clear departure from controlling legislative direction.

First, and we believe dispositively, Congress relied on and built upon the broad interpretation of Section 1981 in *Runyon* and its predecessors in amending 42 U.S.C. § 1988 to provide for court-awarded attorneys' fees in Section 1981 actions against private parties that refused to enter into contracts for racially discriminatory reasons. The House Report expressly cited *Runyon's* companion case, *McDonald v. Santa Fe Trail Transp.*, as well as *Tillman v. Wheaton-Haven Recreation Ass'n* and *Johnson v. Railway Express Agency* — all involving discrimination by private actors that would not have been actionable under the narrow interpretation of Section 1981 urged in the *Runyon*

(Footnote continued)

insofar as it affects the new statute" [citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)]; *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980) (representation by public interest group held not to be "special circumstance" which would result in denial of attorney fees under Title VII, because Congress so decided in passing the Fees Act of 1976); *Cannon v. University of Chicago*, 441 U.S. 677, 711 (1979) ("the relevant inqui , is not what Congress correctly perceived as the then .tate of the law, but rather what its perception of the state of the law was") (citation omitted); *Brown v. GSA*, 425 U.S. 820, 828 (1976) (interpreting legislation built upon prior judicial decisions in light of the understanding of Congress, not in terms of whether that congressional understanding was correct).

dissent — as illustrative of the kinds of Section 1981 actions in which private enforcement was to be induced through court-awarded attorneys' fees. Making the same point, the Senate Report explained that the Fees Act was being applied to Section 1981 cases because

> fees are now authorized in an employment discrimination suit under Title VII of the Civil Rights Act, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action.

S. Rep. No. 94-1011, at 4. Since overruling *Runyon* and its predecessors would without question contravene the Fees Act and its underlying legislative intent, the interest in fidelity to congressional intent surely cannot justify overruling *Runyon*.

Second, as *Runyon* noted, Congress in 1972, clearly informed that Section 1981 had been construed by various courts of appeals to proscribe racial discrimination by private employers, carefully considered and squarely rejected an attempt to repeal Section 1981 as thus understood and to make Title VII the exclusive remedy for employment discrimination. *See* pp. 8-9 above. Again, whether or not Congress' understanding that Section 1981 reached private discrimination in employment and education was historically correct is no longer of decisive importance. *See Patsy v. Board of Regents* and the other cases cited above at p. 16. Since the Fees Act and the Equal Employment Opportunity Act of 1972 evidence a clear legislative understanding and intention that courts should vigorously enforce Section 1981 in private discrimination cases, the Court must refrain from overruling *Runyon* and its predecessors even if convinced that the modern interpretation of that statute as reaching private discrimination was "in

some ultimate sense incorrect," *Brown v. GSA*, 425 U.S. 820, 828 (1976).

At the very least, congressional rejection of the Hruska amendment in 1972, passage of the Fees Act in 1976, the absence of a single bill introduced to overturn *Runyon* in the 94th, 95th or 96th Congresses, and congressional approval of *Runyon* evidenced in the *Bob Jones* hearings of 1982, *see* pp. 8-12 above, taken all together, amount to the kind of congressional consensus that precludes departure from *stare decisis*. Such Congressional refusal to overrule a decision of this Court, where (as here) such a refusal can fairly be discerned, has repeatedly moved the Court not to undertake to correct a "mistake" that Congress is fully capable of correcting. *See Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1450 n.7 (1987) (inferring congressional agreement with a prior decision from the fact that no bills were introduced to change result in highly publicized, controversial case, and noting that Congress remained free to change interpretation if the Court had misconstrued its intent); *Bob Jones University v. United States*, 461 U.S. at 599-602 (inferring congressional acquiescence to an IRS policy from congressional inaction); *Flood v. Kuhn*, 407 U.S. 258 (1972).[15]

[15] *See also Guardians Ass'n v. Civil Service Comm'rs*, 463 U.S. 582, 590 n.11 (1983) (White, J.) ("If a statute is to be amended after it has been authoritatively construed by this Court, that task should almost always be performed by Congress") (citation omitted).

B. This Court's interpretation of Section 1981 in Runyon should be adhered to because it is not inconsistent with related precedent and has not been repudiated by subsequent legislative action

Amici believe that *Runyon* was correctly decided. But even assuming *arguendo* that it misread contemporaneous legislative intent, affirmance would be required.

The essence of *stare decisis* is that something beyond a proven mistake in past interpretation is necessary "to overcome the strong presumption of continued validity that adheres in the judicial interpretation of a statute." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. at 424. "Any detours from the straight path of *stare decisis* in our past," the Court has stressed, "have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and with facts newly ascertained.' " *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986), *quoting Burnet v. Coronado Oil & Gas Co.*, 285 U.S. at 412 (Brandeis, J., dissenting). No reasons of the sort that the Court has previously relied on in departing from *stare decisis* have been offered or are available to justify overruling the rule of *Runyon* and its predecessors.

The seven cases overruling statutory precedents cited by the *per curiam* opinion restoring this case to the calendar, 56 U.S.L.W. 3735 (U.S. 4/26/1988), display the typical, indispensable factors that enable the Court to justify departing from *stare decisis* in statutory interpretation cases: in each of these cases, the Court essentially found that the decision to be overruled was an aberration, either inconsistent with another line of good authority, or subsequently repudiated by Congress in ways that enabled the Court to declare confidently

that the cases were inconsistent with legislative intent. These factors are entirely absent here.

In four of the cases, the Court overruled prior decisions that had been undercut by subsequent decisions construing the same or related statutes in different ways. Preservation of the challenged interpretation in these cases would have left conflicting and irreconcilable lines of parallel authority. Consistent application of congressional intent and fidelity to congressional purposes required resolution of the continuing conflicts. Thus, in *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 245 (1970), the Court overruled *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), stressing that adherence to *Sinclair*, in light of the Court's recent decision in another case, would effectively "oust state courts of jurisdiction in 301(a) suits where injunctive relief is sought for breach of a no-strike obligation," a result which would violate "the clearly expressed congressional policy to the contrary" as recently authoritatively construed. Similarly, in *Peyton v. Rowe*, 391 U.S. 54, 57, 61 (1968), and in *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employee Relations Comm'n*, 427 U.S. 132, 154 (1976), the Court departed from prior interpretations of federal statutes because they had been so undercut by numerous subsequent decisions that, in the words of the *Machinists* decision, the prior authority "must be regarded as having 'been worn away by the erosion of time' . . . and of contrary authority." 427 U.S. at 154, *citing United States v. Raines*, 362 U.S. 17, 26 (1960). And in *Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 322 (1972), the Court relied on the fact that subsequent cases had read the relevant legislative history differently than did the case being overruled. It noted that "later cases ... have repudiated the reasoning advanced in support of the result reached" in the case being overruled and concluded that the case "was never good history and is no longer good law." 406 U.S. at 322.

In two other cases cited in the *per curiam* order, the Court found that the prior statutory interpretations under review had been undercut by subsequent congressional activity indicating clearly expressed legislative intent contrary to the prior interpretation under review. Thus, in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978), the Court noted that a number of its previous judgments (both preceding and following the case overruled, *Monroe v. Pape*) were inconsistent with the rule announced in *Monroe*, and that that rule was "inconsistent with recent indications of congressional intent," as well as "beyond doubt" incorrect as a matter of history. 436 U.S. at 663 n.5, 696, 700. And in *Braden v. 30th Judicial Circuit*, 410 U.S. 484 (1973), the Court noted that subsequent congressional activity had demonstrated that "a number of the premises which were thought to require [the decision in the overruled case] are untenable."

The Court has also overruled a prior decision that departed significantly from earlier decisions and from prior established practice, the results of which were inconsistent with the law established in those decisions. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court overruled a prior decision because its approach to what constitutes a *per se* violation of Section 1 of the Sherman Act "was an abrupt and largely unexplained departure from [the earlier case and was] the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts." Additionally, "[t]he great weight of scholarly opinion" had been critical of the decision, and a number of the federal courts confronted with [the issue] ha[d] sought to limit its reach." 433 U.S. at 44-48.

None of these factors — present not only in the seven cases the Court cited in support of reconsideration here, but in statutory interpretation cases departing from *stare decisis* generally — is present in this case. *See* Point I *supra*. The principle that schools

should not refuse to admit children on account of race, that employers should not consider race in deciding whether or not to engage or terminate employees, and that swimming pools generally open to the white public should be open to blacks as well, is not at odds with other lines of authority in this Court. There is no discernible congressional policy precluding aggrieved individuals from seeking a remedy for private discrimination. Far from being at odds with national policy as embodied in any other legislation, or repudiated by legislation adopted since the *Runyon* result was foreshadowed in 1968, the non-discrimination principle is national policy, determined by the clear and repeated decisions of the people's representatives and duly enacted into law. *See, e.g., Bob Jones University v. United States*, 461 U.S. at 594-95, and pp. 8-14 above.

Accordingly, there is no occasion even for reconsidering *Runyon* and its predecessors, much less for overruling them.[16]

[16] The Court has occasionally relied on additional factors not present in the cases cited in the *per curiam* order here to justify departing from *stare decisis* in statutory cases. *See, e.g., Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1140 (1988) (overruling decisions imposing procedural rule where "[a] half century's experience has persuaded us, as it has persuaded an impressive array of judges and commentators, that the rule is unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals"); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 77-80 (1938) (overruling prior decision which had produced "injustice and confusion" and "an unconstitutional assumption of powers by courts of the United States.") None of these factors supports overruling *Runyon* here.

III

THE POLICIES UNDERLYING STARE DECISIS COUNSEL AGAINST OVERRULING RUNYON v. McCRARY

It is vital that minorities believe that they have a fair forum in which to redress racial discrimination. The principle of *stare decisis* plays an important role in this regard.

As the Court noted in *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 403,

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.

These three policies strongly militate against overruling *Runyon* and its predecessors.

First, the interest in establishing clear guidelines for conduct would be directly undermined by a decision overruling *Runyon*. *Runyon*'s clear pronouncement that racial discrimination has no place in decisions regarding a wide variety of contracts has presumably had widespread educative and deterrent effect. Overruling *Runyon* would erode the ability of those in

positions of authority in private businesses or associations, or responsible for counseling or advising clients, to resist the inclination of others to engage in discrimination. Overruling *Runyon* would also send the wrong signal to those whose conduct may in fact be proscribed by other federal, state or local anti-discrimination statutes. Some persons would understandably attempt to exercise the new-found right to discriminate on the basis of race.

Overruling *Runyon* would also frustrate the reliance of plaintiffs who may have pursued Section 1981 claims in preference to other possible legal claims because of its perceived procedural advantages, particularly the availability of juries. *See Patsy v. Board of Regents*, 457 U.S. at 501 n.3.

Even more importantly, the reliance of the beneficiaries of Section 1981 argues strongly against overruling *Runyon* and its predecessors. These cases have created settled expectations in the hearts and minds of racial minorities who have been assured that they possess a significant guarantee against racial discrimination. To reverse the decision would undermine that security and betray the hopes of millions. *Cf. Wygant v. Bd. of Educ.*, 106 S. Ct. 1842 (1986) (plurality opinion), *id.* at 1852 (O'Connor, J., concurring in part) and *id.* at 1857 (White, J., concurring) (stressing importance of not undermining settled expectations of white teachers).

Second, the interest in avoiding additional burdens on the justices of this Court, important in any case, must be at its zenith in statutory interpretation cases like this, where revisiting a settled question requires extensive research and analysis of a 120-year old

statute through its legislative history.[17] As this Court's decisions construing Sections 1981, 1982, and 1983[18] and the briefs being submitted in this case demonstrate, such belated interpretation (or reinterpretation) is enormously time-consuming, and ultimately inconclusive. The reasons for the Court to leave any necessary further correction to Congress, decisive in the usual case, are therefore particularly compelling here, especially since Congress has shown great interest in questions of civil rights and no reluctance to revisit statutes which it believes this Court has misconstrued.

Finally, and perhaps most crucially, overruling *Runyon* would threaten "public faith in the judiciary as a source of impersonal and reasoned judgments."[19]

Where the interpretation of a statute has arguably been repudiated by Congress, or is inconsistent with conflicting lines of good authority, or has proven unworkable, the occasion for overruling a precedent is self-evident. *See Vasquez v. Hillery*, 474 U.S. at 266.

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[17] "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." B. Cardozo, The Nature of the Judicial Process 149 (1921), quoted in *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1459 (1987).

[18] *E.g., Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).

[19] *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 403. *See also United States v. Rabinowitz*, 339 U.S. 56, 86 (1950) (Frankfurter, J., dissenting) (*stare decisis* essential to avoid "giving fair ground for the belief that Law is the expression . . . of unexpected changes in the Court's composition and the contingencies in the choice of successors."); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 601, 652 (1895) (White, J., dissenting).

Objective circumstances, and not merely a change in the Court's composition, warrants the reconsideration.

Departure from *stare decisis* is unwarranted and dangerous, however, precisely to the extent that considerations of that kind are absent. Here, reconsideration has been ordered absent the request of any party, upon the majority's 5-4 *sua sponte* order directing reargument. Congress has not even colorably repudiated *Runyon*, which to the contrary is demonstrably in accord with existing national policy. (Indeed, Congress has only recently overwhelmingly overridden a presidential veto and thereby effectively overruled one of this Court's statutory civil rights decisions, which had narrowly construed Title IX of the Education Amendments of 1972 so as to narrow the range of racial discrimination by private institutions subject to direct federal oversight.[20])

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[20] In Section 2 of the aptly named Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-6, overruling *Grove City College v. Bell*, 465 U.S. 574 (1984), Congress expressly found that "certain aspects of recent decisions have unduly narrowed or cast doubt upon [civil rights legislation] and legislative action is necessary to restore the prior consistent and longstanding . . . interpretation . . . of those laws . . . ." *See also, e.g., Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670, 678-682 (1983) (construing legislation overruling *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)); Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, overruling *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1974); Voting Rights Act 42 U.S.C. § 1973, overruling *Mobile v. Bolden*, 446 U.S. 55 (1980); The Handicapped Children's Protection Act of 1986, Pub. L. 99-372, 100 Stat. 796, codified at 20 U.S.C. § 1415 (e)(4)(B)-(G), overruling *Smith v. Robinson*, 468 U.S. 992 (1984). Although this Court's opinions historically construed civil rights legislation broadly, like any remedial legislation, to best effectuate its purposes, *e.g., Griffin v. Breckenridge*, 403 U.S. 88, 97 (1971), this canon of construction has all but disappeared from the Court's more recent civil rights decisions.

Under all these circumstances, our obligations as members of the bar of this Court, concerned about its vital position in our system of government and the respect on which its power ultimately depends, compel us to urge on the Court the most deliberate restraint in reaching out to reverse the interpretation of Section 1981 adopted in *Runyon* and its predecessors. Section 1981, as construed in *Runyon*, in modern civil rights jurisprudence, and in post-*Runyon* congressional activity, is a critically important federal statute; and no justification we have seen comes close to justifying overruling *Runyon* and transforming Section 1981 from a vital instrument of justice into a derelict on the waters of the law.

CONCLUSION

For all the foregoing reasons, the Court should reaffirm *Runyon v. McCrary*.

Respectfully submitted,

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